IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

BYRON DONALD WIESE, Petitioner, vs. STATE OF IOWA, Respondent.	No. C 00-0112-MWB **MEMORANDUM OPINION AND ORDER REGARDING REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE**

This matter comes before the court pursuant to the March 29, 2001, Report and Recommendation filed by Magistrate Judge Paul A. Zoss recommending dismissal of petitioner Byron Donald Wiese's petition for a writ of *habeas corpus*. Wiese filed *pro se* objections to the Report and Recommendation on April 19, 2001.

Wiese's *pro se* petition challenges his sentence on his guilty plea in Iowa District Court, pursuant to a plea agreement, to one count of bribery and one count of operating a motor vehicle while intoxicated (OWI-third offense). Pursuant to the plea agreement, Wiese was placed in the Larry A. Nelson Center in Cedar Rapids, Iowa, but that placement was revoked in administrative proceedings, after he failed to provide a urine sample, and he is now incarcerated in the Clarinda Correctional Facility in Clarinda, Iowa. Wiese alleges various violations of his constitutional rights arising from the revocation of his placement in the Larry A. Nelson Center.

No answer by the respondent has yet been filed in this action, because no answer was due until the court received a second amended petition filed by Wiese's court-appointed counsel. Instead of filing such a second amended petition, on January 18, 2001, Wiese's counsel filed a Status Report and accompanying brief informing the court that, in counsel's view, Wiese had only one possibly colorable claim for *habeas* relief, a claim of ineffective

assistance of counsel for failure to advise Wiese properly of the consequences of a guilty plea. However, counsel also opined that such a claim "is procedurally defaulted, not exhausted, and possibly even frivolous." Counsel noted Wiese's disagreement with his conclusions.

In a Report and Recommendation, filed March 29, 2001, based on review of the file in its current condition, "and particularly the status report and brief filed by Wiese's attorney," Judge Zoss recommended that Wiese's petition for *habeas corpus* relief be dismissed without prejudice and that a certificate of appealability be denied. Judge Zoss characterized Wiese's claims as follows: "(1) [Wiese's] plea was involuntary because he misunderstood the consequences of breach of the plea agreement; (2) he received ineffective assistance of counsel during the plea proceedings; (3) he was denied counsel at the revocation hearing in March 1999; (4) he was denied his right to appeal; (5) his appellate counsel was ineffective; and (6) the 'zero tolerance policy' at the Larry Nelson Center violates due process." Judge Zoss concluded that, to the extent that the claims had been presented to the Iowa state courts, they were dismissed on independent and adequate state-law grounds, and to the extent that they had not been presented, they had not been exhausted. Indeed, the only issue that Judge Zoss found had been presented to the Iowa state courts was Wiese's claim that he was denied his right to appeal. However, Judge Zoss concluded that the appeal was dismissed on adequate and independent state-law grounds. Judge Zoss also found that no other claims had been exhausted and that no justification appeared in the record for the failure to exhaust such claims. He therefore recommended dismissal of Wiese's petition without prejudice.

On April 19, 2001, Wiese filed *pro se* a "Notice Of Objection And Ensuing Delivery Of Text," an "Objection To Report And Recommendation, Corrected Status Report, And Motion For Evidenciary [sic] Hearing," and "Brief Accompanying Status Report." In these submissions, Wiese contends that his court-appointed counsel has misconstrued his claims

for *habeas* relief and that Judge Zoss has now done the same thing, leading to an erroneous recommendation for dismissal of his petition. Wiese contends that the essence of all of his claims for relief is that an administrative law judge (ALJ) violated his due process rights in an administrative proceeding on February 28, 1999, by revoking his placement at the Larry A. Nelson Center, not on the basis that he had failed to provide a urine sample—which he contends the ALJ described as "moot"—but on the ground that his original placement at the Center was "illegal," because his bribery conviction made him "ineligible" for such placement. Wiese contends that the ALJ "resentenced" him to the Clarinda Correctional Facility. Wiese contends that such "resentencing" was beyond the ALJ's authority, violated the sentencing judge's order, violated the plea agreement—which Wiese contends was specifically contingent upon his placement at the Larry A. Nelson Center—and was achieved by "connivance" with the prosecuting attorney to circumvent the plea agreement and sentencing order. Wiese contends that his other claims are all related to the ALJ's unconstitutional conduct. Because his claims have never been addressed in these proceedings in the context of his central claim that the ALJ denied his right to due process by "resentencing" him, Wiese requests that the court reject Judge Zoss's recommendation that his petition be dismissed and instead direct that an evidentiary hearing be held at which the focus should be what happened at the administrative hearing on February 28, 1999. Wiese also details all of the occasions on which he has attempted to place before Iowa courts his challenges to the ALJ's actions and his claims of related violations of his constitutional rights.

The standard of review to be applied by the district court to a report and recommendation of a magistrate judge is established by statute:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge's report where such review is required. *See, e.g.*, *Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir.) (citing 28 U.S.C. § 636(b)(1)), *cert. denied*, 519 U.S. 860 (1996); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995) (also citing *Belk*). However, the plain language of the statute governing review provides only for *de novo* review of "those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). Therefore, portions of the proposed findings or recommendations to which no objections are filed are reviewed only for "plain error." *See Griffini v. Mitchell*, 31 F.3d 690, 692 (8th Cir. 1994) (reviewing factual findings for "plain error" where no objections to the magistrate judge's report were filed). The court finds that *de novo* review is required in this case.

Upon such review, the court finds, first, that Wiese has indeed attempted to state in these proceedings the claim of unconstitutional conduct by the ALJ that he now asserts is central to his petition for *habeas* relief. In his original *pro se* "Application for Writ of Habeas Corpus and Appeal in Forma Pauperis of Iowa State Court Action," filed on July 13, 2000, Wiese suggested that he had several grounds for relief, but stated that "the most blatant and obvious violation of due process will be disclosed by the record of the revocation hearing on March 2, 1999."[1] July 13, 2000, *Pro Se* Application for Writ of Habeas Corpus at 1. That violation of due process, Weise alleged, consisted, first, of the denial of counsel during the revocation proceedings, contrary to state law. *Id.* at 1-2. However, Wiese also alleged,

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[1]Wiese's statements about the date on which the revocation proceeding occurred are inconsistent. However, whether the revocation hearing occurred on February 28, 1999, or March 2, 1999, does not appear to have any material effect on claims arising from that proceeding.

> Not only did the hearing officer error [sic] in disallowing counsel, *but she exceeded her jurisdiction when she declared my original sentence "illegal" and resentenced me, removing the OWI eligibility that was the central issue in the plea bargain. This abuse of process is, in my opinion, malicious, and according to the March 15, 1999 memo she used to notify me, the county attorney who was a party to the plea bargain was notified and agreed to join in this connivance, the direct result of which has been my confinement in the Iowa penitentiary system for 16 months and counting*.

July 13, 2000, *Pro Se* Application for Writ of Habeas Corpus at 2 (emphasis added). Thus, the only claims expressly stated in the original *pro se* petition are claims of due process violations in the revocation proceeding.

Wiese filed an amended petition for *habeas corpus* relief on July 31, 2000, which added a variety of related claims, including claims of ineffective assistance of trial and appellate counsel and denial of appeal. However, the first claim in the amended petition again suggests—although perhaps *less* clearly—that all of Wiese's claims for *habeas* relief stem from the ALJ's revocation of his placement at the Larry A. Nelson Center:

> A. Ground one: (a) Involuntary Plea—due to misunderstanding of consequences and prosecutor breach of agreement—Also zero tolerance policy was not revealed at plea.
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> Supporting FACTS (state *briefly* without citing cases or law) I was unaware that my eligibility in the 321J continuum could be removed without due process and I was unaware that my "placement" was not "legal" at the time of sentencing. In a March 15 Memo, the hearing officer, Margo Bilanin (Adm Law Judge), informed me of consultation with prosecution—proof of breach of agreement by prosecution. My copy of The Memo is currently in Iowa Supreme Court proceeding (Mandamus).

July 31, 2000, Second *Pro Se* Petition for Writ of Habeas Corpus at ¶ 12.A (underlining in the original). Although characterized as an "involuntary plea" claim, the primary *factual*

basis for relief on this claim appears to the undersigned again to be that the ALJ determined that Wiese's placement at the Larry A. Nelson Center was "illegal" and revoked Wiese's placement there on that basis. *See, e.g., Frey v. Schuetzle*, 78 F.3d 359, 361 (8th Cir. 1996) ("We note that as a general rule a *pro se* habeas petition must be given a liberal construction and that such a petitioner is not required to identify specific legal theories or offer case citations in order to be entitled to relief.") (citing *Jones v. Jerrison*, 20 F.3d 849, 853 (8th Cir. 1994)); *Jones*, 20 F.3d at 853 ("A district court is obligated to analyze all alleged facts to determine whether they state a federal claim.").

Reading Wiese's first amended petition as a whole, it appears that all other alleged constitutional violations stem from the administrative law judge's change in Wiese's placement. Thus, "Ground two," described as "Denial of effective assistance of counsel," consists of a claim that Wiese was denied counsel at the revocation hearing and a claim that Wiese received inadequate representation during the plea negotiations and after breach of the plea agreement, in light of the ALJ's actions. "Ground three" includes both a claim of denial of a right to appeal, where the time to appeal had already expired before Wiese learned that there was any "illegality" of his sentence to appeal, and a claim of ineffective assistance of appellate counsel in failing to review the transcript of the plea proceeding or the revocation hearing. "Ground four" is cast as an alternative ground for relief, which Wiese admits he had "never really pushed," because he thought that the other grounds for relief were adequate. That ground asserts that the "zero tolerance policy" of the Larry A. Nelson Center, concerning failure to provide a urine sample, violates due process where Wiese was physically unable, not unwilling, to provide a sample and *also* appears to assert a separate claim that revocation of his placement at the Larry A. Nelson Center was improper, because "by Iowa statute the institution has 3 days to object to improper placement."

This is not the reading given Wiese's claims by either *habeas* counsel or Judge Zoss.

Habeas counsel did not appear to recognize that Wiese was attempting to plead a claim for relief based on the ALJ's declaration that Wiese's original sentence was "illegal" and her "resentencing" of Wiese to the Clarinda Correctional Facility. Counsel recited in his status report that, "Determining that Mr. Wiese had failed to provide a urine test, and that he probably should not have been placed in the Larry Nelson Center in the first place, Administrative Law Judge Margo Bilanin revoked Mr. Wiese's placement at the Larry Nelson Center, and placed him into the Clarinda Treatment Center in Clarinda, Iowa." Counsel's Status Report, ¶ 6. Thus, counsel suggests that the focus of the ALJ's decision was Wiese's failure to provide a urine sample, and that the ALJ only observed that Wiese "probably" should not have been placed at the Larry A. Nelson Center in the first place, which is significantly different from Wiese's original allegations of a "blatant" due process violation in the ALJ's determination that the original sentence was "illegal" and consequent "resentencing." The "one possible issue for habeas review" identified by counsel was not the ALJ's alleged violation of Wiese's due process rights, but "Ineffective assistance of counsel for failure to properly advise Mr. Wiese about the consequences of a guilty plea." *Id.* at 13. In his analysis of the "placement" issue in the accompanying brief, counsel analyzed the question only in terms of whether it was unprofessional for counsel to fail to advise Wiese that pleading guilty to the bribery count would affect his placement in the Nelson Center, *see* Counsel's Brief Accompanying Status Report at 2-3, and whether the requisite "prejudice" could be shown by unfulfilled expectations regarding placement, *see id.* at 3-4. *Habeas* counsel never addressed the question of whether the ALJ's "placement" decision itself constituted a violation of due process based on a contention that the ALJ improperly took upon herself the power to declare that a sentence imposed by a court was "illegal" and to alter that sentence, when neither the prosecuting attorney nor the Iowa Department of Corrections had made a timely challenge to the sentence imposed by the court.

Also, there is no indication in *habeas* counsel's status report and brief that counsel ever considered whether a claim based on unconstitutional conduct of the ALJ had been fairly presented to the Iowa courts, such that it had been properly exhausted for federal *habeas* review. In contrast, in his *pro se* "Objection To Report And Recommendation, Corrected Status Report, And Motion For Evidenciary [sic] Hearing," and "Brief Accompanying Status Report," Wiese outlines his attempts to place before state courts his challenge to the constitutionality of the ALJ's conduct and the constitutional sufficiency of his plea and representation in light of the ALJ's conduct.

Similarly, Judge Zoss characterized Wiese's claims as follows:

> Wiese complains that he was deprived of an essential benefit of his plea agreement when he was removed from the Larry Nelson Center in March 1999, for failing to provide a required urine sample. He argues no one told him his placement at the Larry Nelson Center could be terminated if he failed to comply with drug testing requirements at the Center, and therefore, his plea was involuntary and he received ineffective assistance of counsel during the proceedings. He is also unhappy that he was not allowed to appeal his guilty plea to the Iowa Supreme Court and that he did not have an attorney when he appeared before the administrative law judge. Finally, he argues the "zero tolerance policy" at the Larry Nelson Center is unconstitutional.

Report and Recommendation at 4. Thus, Judge Zoss's understanding of the significance of the revocation proceedings had to do with Wiese's alleged failure to comply with drug testing requirements, rather than with the ALJ's allegedly unconstitutional conduct. Judge Zoss concluded that the claims, as he had characterized them, were denied in state court, to the extent that they had ever been presented (and Judge Zoss concluded only the denial of a right to appeal had been so presented), on independent and adequate state law grounds, and otherwise had not been exhausted. Thus, Judge Zoss's Report and Recommendation also does not address a claim that the ALJ violated Wiese's due process rights or consider

the other claims Wiese asserts in the context of the ALJ's alleged violation of Wiese's due process rights.

In these circumstances, Wiese's objection to the Report and Recommendation on the ground that the magistrate judge and his own *habeas* counsel have both misconstrued his claims for relief has merit.

The court recognizes that Wiese's original and amended petitions are not models of clarity. Nor does the court suggest that all of the claims Wiese is attempting to assert are necessarily viable—in terms of factual or legal basis or satisfaction of procedural requirements—even to the extent that they stem from the ALJ's allegedly unconstitutional change in Wiese's placement. However, the court concludes that it would be inappropriate to short-circuit Wiese's attempts to obtain *habeas corpus* relief by dismissing his petition on the basis of *habeas* counsel's and the magistrate judge's apparent misunderstanding of Wiese's central claim for relief. At a minimum, Wiese should be afforded the opportunity to replead—with the assistance of counsel—his claims arising from allegedly unconstitutional conduct by the ALJ. Indeed, under the circumstances, the court believes that it would be better to defer any disposition of Wiese's claims until the respondent has answered the claims and the record in state court has been submitted, so that the court can determine on a more complete record whether procedural requirements have been satisfied and whether the petition states any claims for relief.

THEREFORE,

1. To the extent stated herein, Wiese's *pro se* objections to the March 29, 2001, Report and Recommendation are **sustained** and the Report and Recommendation is **rejected** on the ground that dismissal of this action is premature.

2. This matter is **referred back** to the magistrate judge, pursuant to 28 U.S.C. § 636(b)(1)(B). The magistrate judge shall, *inter alia*,

a. Determine whether new counsel should be appointed or present counsel should

continue to represent Wiese in this matter;

b. Specify the time within which Wiese shall file a second amended complaint, with the assistance of counsel; and

c. Determine whether an answer by the respondent is required to such second amended complaint.

IT IS SO ORDERED.

DATED this 25th day of July, 2001.

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MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA